REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.605 OF 2010

DAVID GATHU KANGETHE…...……...…….APPELLANT

VERSUS

REPUBLIC.……...……...……..RESPONDENT

(Being an appeal from the judgment of the Hon. D. Mulekyo(Principal Magistrate)

in

Kikuyu Principal Magistrate's Criminal Case No.2 of 2009 delivered on 27th October, 2010)

JUDGMENT

David GathuKangethe the appellant herein was jointly charged alongside Joseph Thuo Gikaru with three counts of Robbery with Violence contrary to Section 296(2) of the Penal Code. The three offences were committed on the 5th June, 2008 at Karura Kanyungu village in Kiambu District within Central Province. Particulars of Count I were that the appellant jointly with others not before court while armed with AK47 rifle and a pistol robbed Anthony Mbuthia of motor vehicle registration No.KBA842 W Toyota Corolla valued at Kshs.1,000,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Anthony Mbuthia. In Count II they allegedly robbed Patrick Ngugi Mwangi of Kshs.4,000/= while in Count III they allegedly robbed Rahab Nyambura Mbuthia of Kshs.1,000/-.

At the close of the prosecution's case the learned trial magistrate ruled that the 2nd accused, Joseph Thuo Gikaru had no case to answer and acquitted him under Section 210 of the Criminal Procedure Code. The appellant who was the 1st accused was put on his defence and at the close of his case was found guilty and convicted in all the three counts and was sentenced to suffer death in a manner provided by the law.

The appellant was dissatisfied with both the conviction and sentence and preferred this appeal. From the amended grounds of appeal presented to the court on the date of the hearing, we have crystalized the grounds of appeal as follows:-

1. That the appellant was not properly identified.
2. That there was variance of evidence between the particulars of the charge and the evidence adduced in breach of Section 214 of the Criminal Procedure Code.
3. That the trial magistrate overlooked the first report made by the complainant at the police station which report did not state that the complainant identified the appellant. According to the appellant, the said report did not give his description as to enable the court conclude that he was properly identified.

4. That the learned trial magistrate erred in not considering the appellant's defence.
5. That the learned trial magistrate erred in law in sentencing the appellant to suffer death in the three counts.

The appellant relied on written submissions. With respect to identification, he submitted that the complainants could not have properly identified him in circumstancesin which they were in shock and fear of death and injury. Since they were attacked at the time of the robbery they did not have sufficient time to look at their attackers.

It was also his submission that there was no sufficient lighting at the scene of the robbery. In lieu thereof the complainants did not describe the nature and amount of light at the scene that would enable them to properly identify the appellant.

On the issue of variance of evidence, he submitted that the evidence adduced by the prosecution was not sufficient to support the charges facing him particularly with respect to the time at which the alleged offences were committed. According to him, the occurrence book No.20/21/01/09 could be interpreted that the matter was reported to the police seven and a half months after the robbery had happened. For this reason, the prosecution ought to have amended the charge sheet to reflect the correct time that the robbery took place.

With respect to the first report made to the police, he submitted that the same was made vide occurrence book extract dated 5th June, 2008 of11.30 pm. The same did not reflect that the complainants made a description of him as one of the assailants. In contrast to its content the learned trial magistrate made a finding that he was properly identified.

On the issue of death sentence, he submitted that the sentence could not be imposed on the three counts.

The appeal was opposed. Learned State Counsel Mr. Mureithi submitted that the appellant was properly identified and that his identification was by way of recognition since the identifying witness knew him prior to the date of the robbery. According to him PW1 testified that on the material date on 8th June, 2008 he was driving into his compound in the company of his wife, PW3. At the gate was PW2 who was opening for them when the robbers struck. PW1 attempted to escape and one of the robbers who was armed with a pistol shot at him and he was woundedon his thumb. PW2 recognized the appellant as one of the gang members. An identification parade was conducted and PW2 positively identified the appellant, hence the issue of mistaken identity could not arise. According to Mr. Mureithi, PW1, 2, and 3 testified that there was security light at the gate, so the area was well illuminated as to aid in the identification. After the robbery, the robbers fled off with PW1's motor vehicle while PW2 was still inside. She was abandoned at Mwimuto area.

On the issue of the Occurrence Book (O.B), Mr. Mureithi submitted that the same was availed to the appellant upon his request which indicated that the appellant had been arrested for another offence after the instant robbery. As such there was no variance of evidence with respect to the statement of the charge and the evidence adduced by the witnesses. Further, PW2 did give the name of the appellant as he recorded his statement. This was further corroborated by PW5 who conducted the identification parade in which PW2 positively identified the appellant. PW6 who was the investigating officer further corroborated the evidence of PW5. On the other hand, PW7 the medical officer who produced the P3 form confirmed that PW1 sustained an injury to his thumb. In all, the offence of robbery with violence had been proved.

Finally, on the issue of sentence, Mr. Mureithi submitted that after the judgment was read the appellant appeared to have been contented with it. He clapped his hands which the court interpreted as contemptuous but which could also be interpreted that he was contented with the conviction. He cannot therefore turn around in the appeal and say that he was not happy with the death sentence. Mr. Mureithi urged the court to uphold both the conviction and the sentence.

This being the 1st appellate court, our duty is to reevaluate the evidence and come up with own

conclusions. See the case of **Pandya –Vs- Republic [1957] E.A 336, Ruwulla –VS- Republic [1957] E.A. 570, Njoroge –Vs- Republic [1987] KLR19, Okeno –Vs- Republic [1972] E.A. 32, KariukiKaranja –Vs- Republic [1986] KLR,109.**

The prosecution called a total seven witnesses whose evidence may be summarized as follows:-

PW1,Anthony MbuthiaWangacha who was the complainant in Count I testified that on the 5th June, 2008 he was driving home in the company of his wife (PW3). On arrival at the gate he made a call to his worker Patrick Ngugi (PW3) who would open the gate for them. PW2 opened the gate and they drove in. Whileon the drive way, he heard gun shots behind him. He sped towards the house and packed the car. That is when he saw three men armed with a pistol approach the car and ordered him to come out of the car. One person approached his door and the other where his wife was seated. He was ordered out of the car and to surrender the car keys and thereafter to get into the boot of his car. As one of the robbers bent to pick the car keys he managed to escape into his brother's home and that is when he was shot at and his thumb injured. He ran into his brother's home who took him and his worker (PW2) to hospital while the thieves sped off with his car with his wife inside. His thumb was amputated as it had severe injuries.

According to PW1, PW2 told him that he was able to recognize one of the attackers who he referred to as 'Baju'. After a short time he received information that the vehicle had been found at Mwimuto area. He was admitted at Aga Khan hospital for one week. Police visited him at the hospital and recorded his statement. After one week he learnt that 'Baju' had been arrested and he was identified by his worker, PW2. He was later issued with a P3 form.

PW2,Patrick NgugiMwangi in corroborating the evidence of PW1 testified that he opened the gate for PW1 and his wife (PW3) at about 8.00 pm. After they had driven in they were attacked and he too was attacked and beaten with the gun butt and robbed off cash Kshs.4,000/- which was in his trouser's pocket. He said one of the men was armed with a pistol and another who beat him up was armed with an AK 47 rifle. During the time of the robbery PW1 managed to escape from his car but his vehicle was stolen and driven off with his wife inside. It was later recovered at Mwimuto area. It was his evidence that he was able to identify one of the robbers by the name 'Baju'. He further picked him up in an identification parade conducted five months later. He stated that he was able to identify him from the clothes he was wearing on the date of the robbery and that man was the appellant. He said he used to work in a neighbouring home on casual jobs.

PW3, RahabNyamburaMbuthia also corroborated the evidence of PW1 with respect to how the robbery happened. According to her, the robbers were three in number and after the attack she was ordered to the back seat. She testified that after her husband dropped off the car, she was driven off for about one and a half hours until the robbers were able to commandeer another vehicle before abandoning her. She was robbed off Kshs.1,000/-. She sought help from aneighbouring home. After that, she proceeded to Aga khan hospital where her husband was undergoing treatment for the gunshot on his thumb. She testified that she was not able to identify any of the robbers during the robbery but her houseboy identified a man by the name 'Baju'.

PW4,RobertOjwangof flying squared,Karori testified that on the 19th January, 2009, together with other police officers received information that there had been a robbery near ACK Church Mukui in which a person had died and another robbed of Kshs.45,000/-. Members of the public informed them that the suspects were Joseph Thuo and David Kangethe. They visited the scene on that day and the following day of 20th January, 2009, during which dates members of the public identified to them the home of Joseph Thuo whomthey arrested and escorted to Kikuyu police Station for further investigations. On 21st January, 2009, they arrested David Kangethe(appellant) at his brother's home and they also escorted him to Kikuyu Police Station for investigations. He was later called by the investigating officer to record his statement which related to a different case other than the instant one in which the appellant and Joseph Thuo were being charged. He identified them in court as the accused in the instant case.

PW5,Reuben Langat of CID Kikuyu recalled that on 26th January, 2009 himself and PC Husein were requested to conduct an identification parade in respect of David Kangethe alias 'Baju' who was suspected to have committed the offence of Robbery with Violence. PW5 said that he conducted the parade in which the witness was Patrick Ngugi (PW2) who positively identified the appellant.

PW6, PC Mohammed Hussein Abdi and the investigating officer in the case testified that he was asked to take over the conduct of the investigations on 29th January, 2009. At thattime, the suspects Kagethe and Joseph were being held in the cells. One of them had been positively identified at the time of the robbery by the watchman. He then prepared for an identification parade which was conducted by PW5 in which the appellant was positively identified. The complainants had been robbed of a motor vehicle registration No.KBA 842 W, make Toyota, Kshs.4,000/- and Kshs.1,000/- respectively. He preferred the charges against the appellant and his co-accused.

PW7, Dr. George KunguMwaura testified that on the 16th February, 2009 he examined Anthony Mbuthia (PW1) who had sustained a bullet wound at the base of his right middle finger exiting to the right palm. The hand had severe lacerations which were about 8½ months old. He filled his P3 form which he produced in court as an exhibit. He assessed the degree of injury as grievousharm.

The appellant gave a brief unsworn statement of defence in which he testified that he was a casual labourer and hailed from KaruraKanyungu. He denied that he committed the offence and according to him, on 22nd January, 2009 two men went to his home, arrested him and escorted him to Kikuyu Police Station where he was locked up. Three days later he participated in an identification parade in which a witness who was his neighbour identified him. He stated that he did not know theneighbour who identified him. He also stated that from the Occurrence Book of 5th June, 2008, there was clear evidence that he was not involved in the incident.

Having summarized the evidence on record, it is our view that the following are the issues for determination:-

1. **Whether the appellant was positively identified.**
2. **Whether there was variance of evidence adduced in support of the charges.**
3. **Whether the elements of the offence of Robbery with Violence were proved.**
4. **Whether the appellant's defence was considered by the trial court.**
5. **Whether there was an error in sentencing the appellant to death in the three counts.**

Identification

Out of the three complainants (PW1, PW2 and PW3) only PW2 testified that he identified the appellant. This then was an identification of a single witness who stated that he knew the appellant before the incident. Hence the identification was by recognition. We then grapple with the issues, of;-**Firstly**, whether the identification of the single witness was without an error, and,**secondly**, whether the circumstances of identification were favourable;

According to PW2, the scene which was at the gate was well lit with electricity lamps thus providing a suitable condition for identification. His testimony was as follows:-

"I recognized him for he was beating me at the gate and the gate is illuminated by electricity lamps."

PW3 on the other hand described the lighting at the scene as comprising flash lights and her evidence was as follows:-

"At the gate, there are security lights, my father in-law has installed a flash light that floods the entire gate area, there it is possible for one to see someone."

On his part, PW1 did not describe the nature of the lighting that was at the scene.

From the foregoing, it is clear that the description of the nature of the lighting at the scene by both PW2 and PW3 differed. We also note that the attack was sudden. The attackers pounced on the complainants without notice. PW2 was set on with kicks and knocks as a result of which he sustained injuries from the gun butt. Indeed at that time one of the robbers drew a pistol and attempted to shoot him but the gun jammed. It is then that this robber called out to another robber by the nick name 'Corporal' who came with an AK 47 and started beating him with its butt. From that scenario we conclude that PW2 must have been frightened and unable to look at the robbers. This account of events is vindicated by the evidence of PW1 and PW3 who testified that because of the sudden nature of the attack, they were not able to identify any of the robbers. We are of the view that even if the court warned itself of the danger of convicting the appellant based on the evidence of a single identifying witness that evidence ought to have been examined with considerable circumspection so as to ensure that it cannot be but true before a conviction is founded on it. See the case of **John MureithiNyaga –Vs- Republic 2014 @ KLR.** Also in the case of **Kiilu and Another –Vs- Republic (1995) 1 KLR 174** the Court of Appeal observed as follows:-

"Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence whether it be circumstantial or direct, pointing to the guilt from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness can safely be accepted as free from the probability of error."

Again, in **Wamunga –Vs- Republic (1989) KLR, 424,** the Court of Appeal held as follows:-

"It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."

Further, notwithstanding that PW2 stated that he knew the appellant prior to the incident, during the cross-examination, he stated that he recorded his statement three months after the incident. He also recorded a further statement after the appellant's arrest. We then ask ourselves the question, if PW2 really knew one of the attackers why did it take him so long a time to report the same?This definitely creates an impression that the identification of the appellant could have been a mistake or it was based on mere suspicion. We say so because from the evidence of PW7 the appellant was, after the instant robbery arrested for a similar offence. This may have led PW2 to guess that the appellant could also have attacked him. See the case of **Republic –Vs- Turnbull& Others (1976) 3 ALL ER, 549**which has been adopted with approval by our courts in which the Court of Appeal, Criminal division in England, Lord Widgery CJ pointed out that:-

"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made……"

We would also wish to point out that, in all respects, the identification parade carried out by PW5 could not be relied on. Having pointed out that the identification of the appellant by PW2 was not full proof, we think he picked him out in the parade because he already heard about his arrest and he was someone he knew. Suffice it to say, an identification parade is carried out so as to erase doubts that the suspect the witness saw in the robbery is indeed the person

who committed the offence. It is of no purpose where the witness states that he knew the suspect, physically and by name, before a robbery. All that is required of such a witness is to comprehensively describe the suspect in his report to the police and statement. The witness thereafter in court points at him with ease. But in the present case, the witness was already well known to the appellant prior to the

robbery. Thus the identification parade conducted served no purpose. All that PW2 needed to do was to properly describe the appellant at the time of making the report to the police. Thereafter he would describe him in his testimony and identify him in court. Unfortunately he failed to satisfy these basic conditions when he reported the matter to the police.

We then conclude that the identification of the appellant by PW2 was not satisfactory.

The aspect of identification takes us also to consider the nature of the first report that was made by PW1 vide occurrence book abstract dated 5th June, 2008 at 11.30 pm. The Occurrence Book was provided to the appellant during the hearing of the appeal and according to him the complainant (PW1) did not give his description to the police as narrated to him by PW2 which then weakened PW2's evidence that he properly identified him. We have taken note of the content of the said Occurrence Book extract. It is PW1 who made the report to Corporal Joseph Mwangi of Parklands Police Station. We have further noted that the reportee in any event did not identify the appellant at the scene and of course he did not describe the appellant in the report. Be that as it may, according to the evidence of PW1, he was informed by PW2 that one of the attackers was 'Baju' who is the appellant herein. It was then imperative that he reported to the police that PW2 had told him that one of the attackers was the appellant and how PW2 knew the appellant. All this information was missing in the first report which vindicates our position that the identification of the appellant by PW2 was not satisfactory.

Variance of evidence

Under this head the appellant submitted that although the incident took place on 5th June, 2008 the report to the police was made on 21st January, 2009. Furthermore, the Occurrence Book sheet No.20/21/01/09 confirmed the date of the report. In this regard the prosecution needed to amend the charge sheet so as to correct the anomaly. However, we note that there was the occurrence book No.52 of 5th June, 2008 recorded at 11.30 pm which confirmed the instant robbery. Notwithstanding that some witnesses recorded their statements so long after the incident, of itself, cannot vitiate the fact that the robbery occurred on 5th June, 2008. There was no need for the amendment of the charge sheet in the circumstances. Suffice to say, the Occurrence Book of January, 2009 related to another robbery with violence case in which the appellant and another were arrested.

Proof of the offence of Robbery with Violence

Under Section 296(2) the following are the key elements of the offence of robbery with violence:-

(a) The offender should be armed with a dangerous or offensive weapon or instrument, or

(b) is in company with one or more other person or persons, or

(c) at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other personal violence to the victim.

In the instant case, the attackers were more than one in number, they were armed with guns which are offensive weapons and they used actual violence against the complainants whom they robbed of their personal items. PW1 sustained injuries in the robbery. In that respect, all the ingredients of the offence were satisfied save to say for our foregoing observations there was no evidence that the robbery was committed by the appellant among other assailants.

Consideration of the appellant's defence

According to the appellant the learned trial magistrate did not consider his defence when she arrived at the conclusion of convicting him. We have had the opportunity of going through the learned trial magistrate's judgment. We concur with the appellant that his defence was not considered before a verdict was arrived at. However, the burden of proof lies with the prosecution to prove its case beyond all

reasonable doubts. We have already found that the appellant was not positively identified which factor we will resolve in his favour. Therefore, his defence may not have dislodged the prosecution's burden of proving its case.

The death sentence

The appellant submitted that the learned trial magistrate erred in pronouncing the death sentence in the three counts. It takes us to re-evaluate the nature of the sentence pronounced by the trial court which was as follows:-

"The fact that the accused is a first offender, and his mitigation is considered, this court's hands are still tied when it comes to sentencing once convicted under Section 296(2) of the penal code and it is for this reason, that I sentence the accused to suffer death in a manner provided by law in all the three counts. Right of appeal explained."

We agree with the appellant that there is an apparent error of law and fact because a person cannot suffer death three times. We are also guided in this regard by the case of **BonifaceMutuaMwangi –Vs- Republic (2012) e KLR**, in which the Court of Appeal held that:-

"Proper course of action when an accused is convicted of two charges which carry the death sentence is to condemn him to suffer death in the first conviction while holding in abeyance the second death sentence since one cannot suffer death twice."

The same position was maintained in **Charles KariukiMure –Vs- Republic (2009) e KLR** where court stated that:-

"Where an accused has been convicted on more than one capital offence in the same trial he should be sentenced only on one count as a person cannot be hanged more than once."

We are of a similar opinion that the learned trial magistrate ought to have pronounced the death sentence in the first count and ordered that the sentences in the other two counts be held in abeyance.

Having evaluated the evidence on record, it is our view that the prosecution did not discharge the burden of proving the case beyond reasonable doubts. This appeal must succeed in any event.

In the result, the appeal is allowed, we quash the conviction and set aside the sentence. We further order that the appellant be and is hereby set free unless he is otherwise lawfully held.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 21st day of May, 2015.

L. KIMARU

JUDGE

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1.Appellant in person

2. Ms. Ndombi for the respondent